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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

Of Counsel:

DILWORTH, PAXSON,
KALISH & KAUFFMAN

Raymond F. Scully*
James J. Rodgers
Louise L.M. Tucker
Alexandra D. Sandler
International Square, Suite 280
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 296-9320

Attorneys for Bell Operating Company Respondents

*Counsel of Record

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The Bell Operating Companies,[1] intervenors in support of the Federal Communications Commission in the Court

[1]The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell and Southwestern Bell Telephone Company.

of Appeals for the District of Columbia Circuit below, and respondents here, submit this Brief in Opposition to the Petition of the National Association of Regulatory Utility Commissioners ("NARUC") for a Writ of Certiorari.[2]

COUNTERSTATEMENT OF THE CASE

NARUC seeks review of a unanimous decision of the D.C. Circuit Court of Appeals affirming the FCC's orders which establish a new, comprehensive system of interstate charges to recover the interstate costs of local telephone exchange facilities which furnish access to the nationwide telephone network. The petition challenges a single aspect

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[2]Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Telephone Company are wholly owned subsidiaries of American Information Technologies Corporation, which has outstanding securities in the hands of the public. New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telphone Company of West Virginia and The Diamond State Telephone Company are wholly owned subsidiaries of Bell Atlantic Corporation, which has outstanding securities in the hands of the public. South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are wholly owned subsidiaries of BellSouth Corporation, which has outstanding securities in the hands of the public. New York Telephone Company and New England Telephone and Telegraph Company are wholly owned subsidiaries of NYNEX Corporation, which has outstanding securities in the hands of the public. Pacific Bell and Nevada Bell are wholly owned subsidiaries of Pacific Telesis Group, which has outstanding securities in the hands of the public. Southwestern Bell Telephone Company is a wholly owned subsidiary of Southwestern Bell Corporation, which has outstanding securities in the hands of the public.

of that complex and multifaceted plan, the imposition of monthly flat end user charges upon telephone subscribers. The grounds of the petition are twofold: that the FCC's plan, as affirmed by the decision of the Court below, (1) conflicts with this Court's decision in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), and (2) exceeds the FCC's statutory authority and improperly intrudes into the sphere of regulation of intrastate communications reserved to the States. Neither argument has any substance.

The Commission's action and the Circuit Court's affirmance do not conflict with *Smith*, or with any other decision of this Court or of any other Circuit Court of Appeals. *Smith* dealt solely with the question of allocating the costs of local telephone facilities – which are used for both interstate and intrastate calls – between the interstate and intrastate jurisdictions. *Smith* did not require allocation of these costs to any discrete body of customers, and did not address the manner in which those costs are to be recovered, the sole issue in this proceeding. In the present case there is no issue with respect to the allocation of costs. NARUC does not challenge the allocation of costs between jurisdictions. Simply stated, *Smith* is irrelevant to this proceeding.

Moreover, the Commission's action was not only well within the established boundaries of its statutory jurisdiction to regulate interstate communications, it in no way impinges upon the jurisdiction of the States. The rates established by the Commission are *interstate* rates designed to recover *interstate* costs. The States remain free to establish intrastate rates to recover intrastate costs. Thus, the petition presents no unresolved issue of national importance. There is, in sum, no basis for review on certiorari.

A. Background

This case involves the FCC's orders establishing a method for the recovery — through charges to telephone subscribers and carriers — of the interstate portion of the costs incurred by local exchange telephone companies (*e.g.*, the C & P Telephone Company) in providing access to the telephone network.

The costs at issue include the costs of installing and maintaining the local "loop," including poles, wires, and cables, that connects each customer's premises to the local telephone company's central office. These costs are real economic costs — they include the costs of telephone pole repair and replacement, the maintenance of underground cable damaged by flooding or other causes, as well as depreciation. These costs have two critical features. First, they are not caused by telephone calling or usage by individual subscribers.[3] Because these costs do not vary with the number or frequency of calls made, they are described as non-traffic sensitive ("NTS"). Second, the same local facilities or "loop" are used for both intrastate calling and interstate calling. There is no separate set of poles and cables allotted to intrastate calls and to interstate calls. Because these local facilities are used for both intrastate and interstate calling, some allocation of costs between the two jurisdictions is required.

In accordance with Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), the costs of these jointly used facilities have been divided for ratemaking

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[3]Telephone usage causes a different set of costs such as the installation of additional central office switches and long-distance circuits, needed because of increased customer calling. Those costs, denoted traffic-sensitive costs, are not involved in this case.

purposes between the intrastate and interstate regulatory jurisdictions through a process known as "jurisdictional separations." That portion of the total non-traffic sensitive costs, approximately 74%, assigned to the intrastate jurisdiction has been recovered through rates set by the state public utility commissions. The portion of the costs assigned to the interstate jurisdiction — approximately 26% — has been recovered by interstate rates under the jurisdiction of the FCC.

There is no dispute in this case about the proper method of allocation, or the amount allocated, or the jurisdictional classification, of costs. All parties agree that the costs at issue — the 26% assigned to interstate — are *interstate* costs and that the FCC has jurisdiction to determine how they are to be recovered by the local telephone companies. The basic question in this case is the determination of how these *interstate* costs are to be recovered.

For many years, these non-traffic sensitive interstate costs have been recovered through long-distance rates charged on a usage basis depending on time and distance (e.g., $1.75 for a three-minute call from New York to Los Angeles, with an additional charge for each minute thereafter). As a result of this usage-based rate structure, heavy users of interstate service pay many times the interstate portion of the costs of their own loops, while light long-distance callers — whose loops cost just as much to maintain — may pay only a small fraction of the interstate costs of their loops.[4]

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[4]As a hypothetical example, if the local loop has average total NTS costs of $24 per month in depreciation and maintenance expenses and $6 of those costs is allocated to the interstate jurisdiction, then the total interstate costs to be collected from *two* customers, each with his own loop, are $12 per month. If costs are recovered solely on a per call

In addition to this cross subsidy situation — high-volume users subsidizing low-volume users — the interstate rate structure has for some time contained other anomalies. For example, certain types of interstate calls could be made without involving any allocation of joint local costs to interstate, *i.e.,* Foreign Exchange (FX) service, described by the Court of Appeals in its Opinion at p. 23 (Pet. App. 23a). Further, the entry into the long-distance market in 1974 of other common carriers ("OCCs") in competition with AT&T raised additional discrepancies and disparities in the interstate rate structure. Until 1978, OCCs (such as MCI) and their subscribers made no contribution to the non-traffic sensitive costs allocated to the interstate jurisdiction. In 1978, an interim arrangement was made under which the OCCs made payments to the local telephone companies for the use of non-traffic sensitive facilities, but at a level below those made by the existing interstate carrier.

The Commission recognized that an interstate rate structure with all of these differentials and cross-subsidies could not be maintained in a competitive communications environment in which customers were free to switch to low-cost carriers and could bypass local facilities alto-

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basis and one user makes 11 calls and the other makes only one, at the rate of $1 per call, the high-volume user will pay $11 ($5 more than his own $6 interstate costs), and the light user will pay only $1 (which is only one-sixth of the interstate costs he imposes on the local telephone company). In actuality, the discrepancy is often far greater. About 3% of the nation's business customers generate about 60% of overall business telephone revenue.

gether[5] The restructuring of interstate rates to accommodate the new technological and economic realities of the telecommunications industry became an urgent necessity. The FCC saw the need to eliminate these discrepancies and to move toward equal treatment of all customers. The forces that compelled this action were intensified by the break-up of the Bell System, which became effective January 1, 1984.

B. The Commission's Access Charge Plan

In 1978, the Commission instituted its proceeding in Docket 78-72 entitled *MTS and WATS Market Structure* to deal with these issues. A fundamental purpose of the plan developed by the FCC was to shift the burden of costs to those who caused them and to eliminate the unfairness of existing methods of recovery of non-traffic sensitive costs.

The FCC issued five notices and supplemental notices of proposed rulemaking and weighed the comments of over 140 parties spread over tens of thousands of pages of the administrative record before issuing its 253-page *Access*

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[5]Under a usage-based rate structure, high volume users are given a strong, artificial incentive to "bypass" the local telephone network by building their own communications facilities. As noted above, a very small percentage of customers generate most interstate revenues. For each telephone line, a heavy user may pay *each month* hundreds or even thousands of dollars as a contribution to interstate NTS costs through per call rates. Yet, the cost of that subscriber's NTS plant may be only $24 per month, of which only $6 has been allocated to interstate pursuant to Section 410(c) of the Communications Act. The high-volume user thus has a very strong incentive to bypass the network so long as he can do so at a cost less than the hundreds of thousands of dollars per month per line he is otherwise contributing.

Order, 93 F.C.C. 2d 241 (1983).[6] In reaching its decision, the FCC sought to accommodate four objectives: the continued assurance of universal telephone service, the elimination of unjust discrimination and unlawful preferential rates, the encouragement of network efficiency and the prevention of uneconomic bypass. The Commission concluded that these various objectives could best be met by a system of charges in which each residential and business telephone subscriber paid directly a flat monthly end user charge to cover most of the interstate, non-traffic sensitive costs of the plant dedicated to that subscriber.

The Commission's decision to impose a portion of the non-traffic sensitive costs upon all end users is both basically fair and in the overall public interest. It is fair because all end users cause those costs and in equity should pay for them. It is in the public interest because the FCC's approach would gradually phase out the subsidy of light users by heavy users, thereby lessening the threat of bypass and, at the same time, helping to preserve universal service.[7]

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[6]The *Access Order* was subsequently modified by the Commission's *Reconsideration Order,* 48 Fed.Reg. 42,984 (1983), and its *Further Reconsideration Order,* 49 Fed.Reg. 7,810 (1984) (which specifically addressed objections to the *Access Order*).

[7]The FCC found that this transition to end user charges should be achieved gradually, accompanied by a variety of measures designed to safeguard universal telephone service, including the creation of a Universal Service Fund to provide assistance to high cost exchange companies and the institution of proceedings to define a category of subscribers who would be exempt from the end user charge. Rather than collect the full interstate NTS costs at once through flat end user charges, the FCC's *Reconsideration Order* provided that in 1984, each residential end user would pay only $2 per month per line and each business user a maximum of $6 per month, with gradual increases in

Recovery of a portion of the non-traffic sensitive costs assigned to the interstate jurisdiction through flat end user charges also reduces the amount that must be recovered through other interstate charges.[8] The end user charges do not change the total amount of interstate costs associated with interstate service. They merely shift the mechanism of recovering those non-traffic sensitive costs from a usage charge to a flat charge basis.

C. Decision of The Court Below

On petitions for review by NARUC and others, the Court of Appeals for the District of Columbia Circuit affirmed in a lengthy *per curiam* opinion, 737 F.2d 1095. The Court concluded that "the decisions at issue, . . . are within the Commission's authority and, for the most part, are rationally grounded and sufficiently supported by evidence. We therefore affirm the FCC's orders in all major respects." (Pet. App. 19a).[9] The Court held that the FCC's decision to impose end user access charges for the recovery of interstate costs was within the Commission's statutory jurisdiction and did not conflict with this Court's decision in *Smith.* In the Court's view, the petitioner had misap-

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the following years. The Commission's *Further Reconsideration Order* further altered the imposition of end user charges, postponing until June 1, 1985 the implementation of end-user access charges for residential and single line business customers and placing a $4 ceiling on those charges until at least 1990.

[8]In addition to flat end user charges, the FCC imposed a monthly charge to be collected from interexchange carriers such as AT&T, GTE Sprint, MCI and SBS. This carrier common line charge is paid by the interexchange carriers as a contribution toward the recovery of the interstate allocation of NTS costs, separate and apart from the other charges paid by interexchange carriers to cover traffic sensitive switching and routing costs of local telephone companies.

[9]The Court remanded to the Commission two minor issues not pertinent to this proceeding. *Id.*

prehended the holding of *Smith* because *Smith* "did not address the manner in which the federal agency was to perform its task" of determining the method of recovery of those local telephone company costs assigned to the interstate jurisdiction. As the Court noted: "Petitioners confuse or blend two questions: (1) jurisdiction or authority to recover costs; (2) the manner in which costs are to be recovered." (Pet. App. 37a).

The Court further held that the Commission's decision to recover these costs through flat-rate end user charges did not exceed the Commission's statutory authority as limited by Section 2(b) of the Communications Act. In so holding, the Court focused on NARUC's fundamental misconception of the nature of the Commission's Order:

> Petitioners here lose sight of the Commission's main theme. The end user charge reflects costs caused not by a subscriber's actually making interstate calls, but by the subscriber's connection into the interstate network, which enables the subscriber to make interstate calls. The same loop that connects a telephone subscriber to the local exchange necessarily connects that subscriber into the interstate network as well. Under *Smith,* a portion of the costs of that loop are assigned to the interstate jurisdiction, for recovery under the regulatory authority of the FCC, on the basis of a complex division taking into account statistical calling patterns. That separations decision, however, does not affect the cost of the loop. Local telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of the subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes. The FCC may properly order

> recovery, through charges imposed on telephone subscribers, of the portion of those costs that, in accordance with *Smith,* have been placed in the interstate jurisdiction.

(Pet. App. 40a).

REASONS FOR DENYING THE WRIT

1. There Is No Conflict Between the Decision Below and This Court's Decision in *Smith v. Illinois Bell.*

NARUC seeks to create a ground for granting certiorari by fabricating an alleged conflict with *Smith v. Illinois Bell Telephone Company,* 282 U.S. 133 (1930). There is no conflict and NARUC's argument misstates both the holding and the implications of *Smith.*

The facts of the *Smith* case are detailed in the opinion of the Court of Appeals (Pet. App. 34a-37a) and there is no need to repeat them. The basic point is that *Smith* required only that a portion of the non-traffic sensitive costs of the local telephone loop be assigned to the interstate jurisdiction. *Smith* dealt solely with the requirement that the local exchange's non-traffic sensitive costs be apportioned, in some rough fashion,[10] between the interstate and the intrastate regulatory jurisdictions. *Smith* did not address how the two jurisdictions were to *recover* these costs. That is the fatal flaw in NARUC's argument. As the Court below carefully discussed, NARUC has improperly mixed

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[10]This Court recognized the difficulty of making such an apportionment, stating that "extreme nicety is not required, only reasonable measures being essential." 282 U.S. at 150. The only regulatory scheme ruled out by this Court in *Smith* was that with which it was faced, *i.e.*, one which "*ignore[d] altogether* the actual uses to which the property is put." *Id.* at 151. (Emphasis added).

the question of jurisdiction or authority to recover costs with the question of how those costs are to be recovered (Pet. App. 37a). *Smith* dealt only with jurisdiction. It did not deal with the manner of cost recovery.

NARUC's assertion that *Smith* requires that the cost of jointly-used local exchange property allocated to the interstate jurisdiction be recovered solely from "interstate end users" (or interstate carriers) is wrong for two reasons. First, *Smith* holds no such thing; it makes no reference to "interstate end users." As *Smith* recognized, the recovery of costs allocated to the interstate jurisdiction is the sole province of the federal regulatory agency. 282 U.S. at 148. The recovery of costs allocated to the intrastate jurisdiction is the sole province of the state regulatory agencies.

Second, the "interstate end user," who NARUC posits should bear the non-traffic sensitive costs allocated to the interstate jurisdiction, is a creature of NARUC's imagination. There is no separable class of "interstate end users." Although some telephone subscribers make many more interstate telephone calls than others and indeed, at certain time intervals, some subscribers may make no interstate calls, all subscribers are, in effect, "interstate end users" by virtue of the fact that their telephone is linked 24 hours a day, 365 days a year to the long distance, interstate, telephone network. Regardless of whether any given subscriber makes (or receives) a long distance call once a year or once a day, the same real economic costs of maintaining his or her access to the interstate network are incurred. Telephone poles must be repaired, and flooded or damaged cable must be replaced regardless of how often any given subscriber lifts the receiver to dial a call outside of his or her local exchange.

NARUC's suggestion that the interstate portion of non-traffic sensitive costs be recovered solely from a hypothetical class of "interstate users" also ignores the fact that when a telephone happens not to be used for interstate calls in a given month, an average of 26% of the non-traffic sensitive costs of that line are still assigned to the interstate jurisdiction. NARUC cannot have it both ways; because 26% of the non-traffic sensitive plant costs of each loop are assigned to the interstate jurisdiction, the structuring of rates to recover these interstate costs is a judgment reserved to the FCC.[11]

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[11]Section 410(c) of the Communications Act created a Federal/State Joint Board to make recommendations concerning the separation of non-traffic sensitive costs. 47 U.S.C. §410(c). NARUC argues that in enacting Section 410(c), Congress in effect endorsed NARUC's interpretation of *Smith*. NARUC's attempt to bolster its argument with fragments of the legislative history of Section 410(c) is unavailing. In enacting Section 410(c), Congress intended to *preserve* "federal superintendence" in the separations process. Senate Report No. 92-362 (September 17, 1971), reprinted in 2 U.S. Code Cong. & Adm. News (1971) at 1515 ("In order to retain *Federal superintendence* in this field, however, the State members [of the Joint Board] would not vote on the final decision. . . . H.R. 7048 would achieve the purpose of joint participation without abandoning *Federal superintendence* in the field"). (Emphasis added.)

An earlier version of the legislation would have given final authority over the separations process to the Joint Board. 117 Cong.Rec. 15981, 28906 (1971). As enacted, Section 410(c) gives the Joint Board advisory power only. The FCC retained final control over any cost allocation scheme. As one member of the House saw it, the legislation changed little, cost nothing and served "as a sop to the States." 117 Cong.Rec. 28907 (1971). Significantly, nothing in the legislative history suggests that Section 410(c) would have any bearing whatsoever on the manner in which the FCC provided for the *recovery* of costs allocated to the federal sector. The language which NARUC attributes to Senator Magnuson adds nothing to the debate. It is merely a paraphrase of the language of *Smith* itself, which requires cost separation, rather than a cost recovery mechanism.

2. The Access Charge Plan Was a Proper Exercise of the FCC's Jurisdiction Which Does Not Call For Intervention By This Court.

The FCC's access charge plan, including the end user charge, represents an ordinary and proper exercise of the Commission's jurisdiction to regulate interstate communications. The FCC's authority to regulate the matters in question is plain from the face of the Communications Act, and its decision to impose an end user charge is an exercise of discretion inappropriate for review by this Court on certiorari. Moreover, NARUC's legal arguments are grounded in a fundamental disagreement with the factual underpinnings of the decisions below. As NARUC frankly states, "NARUC does not agree with the D.C. Circuit's conclusion that a user incurs interstate costs merely by being provided with access to the interstate system regardless of whether he *ever* makes use of the system. Costs are incurred when a user accesses the system to originate and terminate interstate calls." (Petition at 18 n.20).

NARUC's petition suggests the kind of fact-specific inquiry which is plainly inappropriate for this Court's review on certiorari. The Court of Appeals concluded that, with two very narrow exceptions not pertinent here, the decision of the FCC was "rationally grounded and sufficiently supported by evidence" (Pet. App. at 19). These findings should not be reexamined.[12]

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[12] *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Denial of certiorari is further counseled by the principle that an agency's established construction of its enabling legislation and of the scope of its own jurisdiction is entitled to deference. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1043 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) ("*North Carolina II*").

NARUC's claim that the FCC's end user access charge intrudes into the States' authority over "the intrastate sphere" bears no relationship to the facts underlying the FCC's exercise of its regulatory judgment. All non-traffic sensitive plant is in part *interstate* plant subject to FCC authority. Because the FCC's flat end user charges constitute a method of recovering *interstate* NTS costs which have been allocated to the *interstate* jurisdiction under statutory procedures, they are authorized under Section 2(a) of the Communications Act, 47 U.S.C. § 152(a).

Indeed, the FCC's action in the current case rests on much stronger ground than the earlier *North Carolina*[13] and *Computer II*[14] decisions, which were upheld by the Courts of Appeals and were denied certiorari.[15] This case

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[13]*North Carolina II; North Carolina Utilities Comm'n v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976) ("*North Carolina I*").

[14]*Computer and Communications Industry Ass'n v. FCC,* 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 103 S.Ct. 2109 (1983) ("*Computer II*").

[15]Those cases upheld the federal power to preempt state regulation of customer premises equipment (i.e., telephone sets and other equipment on customers' premises), notwithstanding the fact that the principal use of that equipment was for intrastate communications. *See also, New York Tel. Co. v. FCC,* 631 F.2d 1059, 1062, 1064-66 (2d Cir. 1980) (FCC has jurisdiction over local exchange service when used in connection with interstate FX and CCSA services); *California v. FCC,* 567 F.2d 84, 86-87 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978) (upholding FCC regulation of intrastate FX, given the impracticality of separating it from interstate FX); *Southern Pacific Communications Co. v. Corporation Comm'n,* 586 F.2d 327, 333 (Okla. 1978) (FCC's authority to regulate equipment used for both interstate and local communications is paramount even where the equipment is used predominantly for intrastate calls); *Puerto Rico Tel. Co. v. FCC,* 553 F.2d 694, 698-700 (1st Cir. 1977) (no matter how frequently or infrequently a subscriber places interstate calls, *federal* standards apply to conditions placed on access to interstate network).

is not a federal preemption case. There is no dispute here that the portion of the non-traffic sensitive costs assigned to the interstate jurisdiction are costs subject to the FCC's jurisdiction. This case simply concerns the exercise of federal jurisdiction over interstate rates about which there is no jurisdictional conflict.[16]

The *North Carolina* and *Computer II* cases are, however, instructive in establishing the limited application of Section 2(b) in restricting the FCC's exercise of its jurisdiction.[17]

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[16]*Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, ___ U.S. ___, 103 S.Ct. 1713, 75 L.Ed. 2d 752 (1983), cited by the Department of Public Utility Control of the State of Connecticut ("Connecticut") in its Brief in Support of NARUC's Petition, establishes no more than that the courts must respect and give effect to a statutory reservation of authority to the States. Neither that case, nor any of the arguments presented by Connecticut, in any way questions the fundamental proposition that the decision below was not based upon asserted preemption, nor upon a disregard for the reservation of authority to regulate intrastate communications to the States in Section 2(b). Rather, the decision below rests upon the proposition that the reservation of authority to the States did not prohibit the access charge in question here, because that charge is not an intrastate charge, but an interstate charge.

Connecticut's other argument in support of the petition is actually an attack upon the merits of the FCC's exercise of discretion to impose an end user access charge, rather than its jurisdiction to do so. That decision was a lawful and proper exercise of the Commission's decision making authority and was affirmed on that basis. (Pet. App. 44a-56a). In any event, this argument does not support the granting of a writ of certiorari to decide either of the questions presented by the NARUC petition.

[17]NARUC also refers to Section 221(b) of the Communications Act, 47 U.S.C. §221(b), as support for its argument that the FCC exceeded its authority in adopting an end user access charge. The Court of Appeals held "Section 221(b) is irrelevant to the problem before us; its limitation on Commission regulation of telephone exchange service was merely intended to preserve state regulation of local exchanges that happen to overlap state lines.' [*Computer II*, 693 F.2d at 216]." (Pet. App. at 39a n.21).

Section 2(b)(1), 47 U.S.C. §152(b)(1), which excludes intrastate communications from the Commission's regulatory authority, is applicable *only* to those intrastate facilities *"separable from* and . . . not substantially affect-[ing] the conduct or development of interstate communication." *North Carolina I,* 537 F.2d at 793. (Emphasis added.) The mere fact that facilities are used "predominantly" for local communication does not transform them into intrastate facilities for purposes of §2(b). *North Carolina II,* 552 F.2d at 1046.

The fact that end user charges may be imposed on some subscribers who elect to make no interstate calls is, contrary to NARUC's suggestion, without jurisdictional significance. As pointed out above, the charges are designed to recover costs that are incurred regardless of usage. Moreover, the decisions of the First, Second, Fourth and D.C. Circuits have established that the provisions of Section 2(b) of the Communications Act do not restrict the FCC's range of discretion in the exercise of its jurisdiction to regulate interstate communications. See n. 13-15, *supra.* As early as 1977, the Fourth Circuit characterized a similar attack on the FCC's jurisdiction as an "assault over old terrain." *North Carolina II,* 552 F.2d at 1044. As noted by the Court of Appeals in *North Carolina II,* it is "difficult to credit an argument which amounts to an assertion that Congress created a regulatory scheme that depends on the calling habits of telephone subscribers to determine the jurisdictional competence of the FCC versus state utility commissions." *Id.* at 1046. *See Computer II,* 693 F.2d at 214-17 (the mere fact that some telephone subscribers may use telephone equipment to make only local calls does not preclude the FCC from establishing policy relating to customer premises equipment).

The Fourth Circuit in *North Carolina II* specifically rejected an argument that the exercise of FCC jurisdiction

over terminal equipment would improperly deprive the States of meaningful ratemaking power by reducing opportunities for the state commissions to create subsidies for other services and facilities through revenues associated with terminal equipment. 552 F.2d at 1048. Like the equipment registration program sustained in *North Carolina II,* the Commission's access charge plan in no way purports to establish charges for local services; state commissions remain unfettered in their discretion to set rates for all local services and facilities provided by the telephone companies. 552 F.2d at 1047.

NARUC asserts that the *North Carolina* and *Computer II* cases, upon which the Court of Appeals relied below, are applicable only where the subject matter of regulation is inseparable between its interstate and intrastate aspects, such as a physically indivisible item of telephone terminal equipment. What NARUC overlooks is the fact that access to the interstate and intrastate networks, just like customer premises equipment, is in fact inseparable. Access to both the intrastate and interstate networks is automatically and necessarily conferred on *all* telephone subscribers.

NARUC's characterization of the end user charge as "an additional intrastate rate" is misleading and incorrect. (Petition at 17-18). The fact that payment of the end user charge may, as a practical matter, be a condition of local service merely reflects the inseparability of access to the local and interstate telephone networks. Where the FCC has lawfully established such a charge for interstate access, the fact that local service may incidentally be conditioned upon payment of such a charge does not make it an intrastate charge, and does not invalidate the FCC's action.

The FCC's access charge plan asserts jurisdiction only over the *interstate* costs of access to the network. As

NARUC notes, (Petition at 19-20), these costs have already been allocated to the interstate jurisdiction through the separations process. Therefore, there is no interference with state regulation of the recovery of intrastate costs, and no conflict between federal and state regulation that might require analysis under the principles of preemption.

Finally, the alternatives suggested by NARUC are, as the Court of Appeals pointed out, unworkable. (Pet. App. at 42-43). Adoption of NARUC's view that interstate access charges should be imposed only on those end users who actually make or receive interstate calls within a given billing period would involve the creation of an enormously complex and necessarily inefficient system for the allocation and collection of the relevant costs. The logical implication of such a policy, according to *Smith v. Illinois Bell,* would be to require an increase in the allocation of costs to be borne by the intrastate jurisdiction, and consequent recovery of those costs through increased intrastate rates charged by the operating companies to the "local" ratepayers. As the Court of Appeals noted, "it is hard to see what significant benefit NARUC would gain under such an arrangement." (Pet. App. at 43a).

Thus, the FCC's orders were well within the established bounds of the statutory authority of the Commission and do not conflict with the regulatory authority of the States. This case presents no unresolved issue of national importance that requires review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Of Counsel:

DILWORTH, PAXSON,
KALISH & KAUFFMAN

Raymond F. Scully*
James J. Rodgers
Louise L.M. Tucker
Alexandra D. Sandler
International Square, Suite 280
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 296-9320

Attorneys for Bell Operating Company Respondents

*Counsel of Record

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